Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

ALFRED G. GEROSA, JOSEPH MITRIONE, JOHN J. PYLILO, PAUL M. MANTIA, ANGELO SCAGNELLI, BERT GALLO, AND JOHN PAGLIUCA, TRUSTEES, CEMENT MASONS' LOCAL 780 PENSION FUND,

Petitioners,

v.

SAVASTA AND COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(a)(3), permits the Trustees of a multi-employer pension fund to pursue a cause of action against a non-fiduciary actuarial service provider for compensatory damages in federal court, where the negligence and misfeasance of said actuary solely caused the severe underfunding of, and damage to, the Pension Fund.

LIST OF PARTIES

The parties in the United States Court of Appeals for the Second Circuit were the Petitioners, Alfred G. Gerosa, Joseph Mitrione, John J. Pylilo, Paul M. Mantia, Angelo Scagnelli, Bert Gallo, and John Pagliuca, Trustees of Cement Masons' Local 780 Pension Fund (hereinafter "Trustees" or "Pension Fund") and Savasta and Company, Inc, which was Appellant/Cross-Appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioners, Alfred G. Gerosa, Joseph Mitrione, John J. Pylilo, Paul M. Mantia, Angelo Scagnelli, Bert Gallo, and John Pagliuca, Trustees of Cement Masons' Local 780 Pension Fund, state that the Pension Fund is not a corporation and, therefore, it neither has a parent corporation nor is it part of a publicly held company owning 10% or more of another corporation's stock.

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ALFRED G. GEROSA, JOSEPH MITRIONE, JOHN J. PYLILO, PAUL M. MANTIA, ANGELO SCAGNELLI, BERT GALLO, AND JOHN PAGLIUCA, TRUSTEES, CEMENT MASONS' LOCAL 780 PENSION FUND,

Petitioners,

v.

SAVASTA AND COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

Alfred G. Gerosa, Joseph Mitrione, John J. Pylilo, Paul M. Mantia, Angelo Scagnelli, Bert Gallo, and John Pagliuca, Trustees of Cement Masons' Local 780 Pension Fund (hereinafter "Trustees" or "Pension Fund"), respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in its Case Nos. 02-9005 and 02-9007 on May 19, 2003, pertaining to the interlocutory order of the United States District Court for the Southern District of New York (Hellerstein, *J.*), reversing that portion of the District Court's Order which determined that the remedies sought by the Trustees on behalf of the Pension Fund were available under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1132(a)(3).

OPINIONS BELOW

The Decision and Order of the United States Court of Appeals for the Second Circuit is reported at 329 F.3d 317 (2d Cir. May 19, 2003) and is reprinted at Appendix A to this Petition, A-1, *infra*, together with the Decision and Order of the United States District Court for the Southern District of New York, reported at 189 F.Supp.2d 137 (S.D.N.Y. March 13, 2002), which is reprinted at Appendix B to this Petition, B-1, *infra*.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on May 19, 2003 (Appendix A, at A-1, *infra*). The Court of Appeals reversed and remanded the decision of the District Court (Appendix B, B-1, *infra*). The District Court decision found that the remedies sought by the Petitioners were available under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1132(a)(3)(2000). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)(Courts of appeals; certiorari; certified questions).

STATUTORY PROVISION INVOLVED

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(a)(3)(Civil enforcement), provides, in relevant part:

(a) Persons empowered to bring a civil action

A civil action may be brought –

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates

any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

STATEMENT OF THE CASE

Petitioners, Alfred G. Gerosa, Joseph Mitrione, John J. Pylilo, Paul M. Mantia, Angelo Scagnelli, Bert Gallo, and John Pagliuca, Trustees and fiduciaries of Cement Masons' Local 780 Pension Fund, on behalf of that Pension Fund (hereinafter collectively "Trustees" or "Pension Fund"), filed a Complaint against Savasta and Company, Inc. (hereinafter "Savasta") on February 28, 2001. The Pension Fund is a jointly-trusteed plan established by employers and United Cement Masons Union Local 780 in accordance with Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186. It is also an "employee pension benefit plan" within the meaning of the Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA"), 29 U.S.C. § 1001, *et seq.* The Trustees of the Pension Fund are fiduciaries and were empowered to bring the underlying action on behalf of the Pension Fund and its beneficiaries pursuant to Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). The Pension Fund sought to redress breaches of statutory and common law duties by Savasta that occurred when Savasta performed actuarial duties on behalf of the Pension Fund.

A. Relevant Facts.

The Pension Fund retained the services of Savasta to provide actuarial services, valuations and reports in accordance with the provisions of Section 103 of ERISA, 29 U.S.C. § 1023. ERISA requires the Pension Fund to publish and file with the Department of Labor an annual report. A necessary component of that report is an

actuarial statement and opinion. *See* Sections 103(a)(4)(B), 103(d) of ERISA, 29 U.S.C. §§ 1023(a)(4)(B), 1023(d). Savasta provided actuarial reports as part of this Pension Fund's annual reports. The Pension Fund relied on Savasta to perform its duties in accordance with the provisions set forth in ERISA. Despite these statutory obligations, however, Savasta negligently performed its duties to the Pension Fund and inexplicably misplaced, lost or destroyed data files generated by, and created for, the Pension Fund. As a result, the Pension Fund has suffered millions of dollars in losses and is underfunded.

More specifically, Savasta performed annual actuarial valuations for the Pension Fund for fiscal years 1994, 1995, 1996, 1997 and 1998. In substance, the annual actuarial valuations conducted by Savasta for each fiscal year through 1997 showed that the Pension Fund was overfunded. The vested benefit funded ratio in 1994 was 128%, in 1995 was 110.8% and in 1996 was 110%. Appendix B, at B-2. Based on those actuarial valuations, Savasta advised the Pension Fund to adopt certain benefit increases in 1997 and the Trustees so adopted those increases. *Id.*

Notwithstanding these recommendations, Savasta determined that an error had been made in its calculations and issued a valuation for 1998 indicating that the "assets of the Fund [were] not sufficient to cover the cost of all vested benefits" and, as a result, the Pension Fund was funded only at 71.3%. Appendix B, at B-3. Savasta explained that the increase in liability was "due to data correction." Appendix A, A-4. When counsel for the Pension Fund contacted Savasta and attempted to obtain any and all data used by it in rendering its actuarial valuations, Savasta notified the Pension Fund that the documents were "missing." *Id.* The Pension Fund is now, as a direct result of the negligent advice of Savasta, in an underfunded position and does not have sufficient assets to pay future benefits.

B. Procedural History.

On February 28, 2001, the Trustees of the Pension Fund filed a Complaint against Savasta to recover losses suffered by the Pension Fund. In that action, the Trustees raised a claim pursuant to ERISA and state law claims for promissory estoppel and breach of contract. Savasta petitioned the District Court for dismissal of the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on or about May 15, 2001. An Opinion and Order was issued by Judge Alvin K. Hellerstein on March 13, 2002 and is published at 189 F.Supp.2d 137 (S.D.N.Y. 2002), Appendix B, at B-1, *infra*. In that decision, Judge Hellerstein granted Savasta's motion to dismiss the state law claims, but denied the motion to dismiss and retained jurisdiction over the Pension Fund's ERISA claim. The District Court granted the Pension Fund leave to file an amended complaint to re-plead the remedy portion of the ERISA claim to include compensatory damages.

On or about March 25, 2002, Savasta petitioned the United States Court of Appeals for the Second Circuit for permission to appeal those portions of Judge Hellerstein's Opinion and Order (1) that failed to dismiss the complaint for the Pension Fund's alleged failure to plead actual, concrete damages, and (2) that permitted the Pension Fund's ERISA claim to proceed. The Pension Fund filed its cross-motion for permission to appeal on or about April 11, 2002, requesting permission to appeal that portion of Judge Hellerstein's Opinion and Order that dismissed the state law claims of the Pension Fund as preempted under ERISA. A Mandate dated August 30, 2002 was issued by the Court of Appeals granting both parties permission to appeal.

On May 19, 2003, the Court of Appeals reversed both holdings of the District Court and remanded the case. (Appendix A, A-1, *infra*). As is relevant to this Petition, the Court of Appeals concluded that the Pension Fund sought consequential damages and that "there is no remedy

available under ERISA to redress the grievance alleged in [the Trustees'] Complaint." Appendix A, at A-10. In rendering its decision, the Court of Appeals primarily and erroneously relied on this Court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)("*Mertens*").

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Second Circuit determined, as a matter of law, that Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), does not provide an appropriate remedy to the fiduciaries/Trustees of the Cement Masons' Local 780 Pension Fund for the damages caused by the negligence and misfeasance of Savasta and Company, Inc., an ERISA-enrolled actuary employed by the Fund, as required by ERISA. At the heart of this appeal is the financial viability of a multi-employer Pension Fund which is clearly underfunded for the benefits it is obliged to furnish to its intended beneficiaries. The reason for this underfunded status is entirely due to the improper and negligent actuarial services rendered by the actuarial firm retained by the Pension Fund. The precise nature of the professional errors may never be known, because the service provider inexplicably misplaced or destroyed all records, data and other paperwork generated while employed to perform actuarial services for the Pension Fund.

Actuaries play a necessary and key role in the funding and benefit allocation of pension plans pursuant to ERISA. Pension plans require guidance from this Court as to how to enforce the standards imposed by ERISA, and otherwise to seek redress when those standards have been abrogated through negligence and misfeasance. Prior decisions of this Court have not directly answered the question presented herein and, as such, this case poses an important question of federal law that should be resolved by this tribunal. It is respectfully submitted that the Court of Appeals in this case incorrectly applied precedent from this Court in dismissing the claim of the Pension

Fund, and it is respectfully requested that this Court review that decision.

ERISA provides standards of conduct for professional service providers and imposes certain duties on those service providers in rendering aid to employee benefit plans. That statute requires qualified employee pension benefit plans, such as the Pension Fund, to engage the services of enrolled actuaries and other professional service providers. *See* Section 103(a)(4)(A) of ERISA, 29 U.S.C. § 1023(a)(4)(A). The purpose of enrolled actuaries, in particular, is to assure that these plans are adequately funded. *See* Section 302 of ERISA, 29 U.S.C. § 1082. ERISA requires assessments and valuations from actuarial professionals as to the actual and projected experience of these plans.

The Act further establishes the standards for services rendered by enrolled actuaries and requires that actuaries perform valuations of employee benefit plans on a yearly basis. Specifically, ERISA requires that an "Actuarial Statement" shall be included in each benefit plan's annual statement. Fiduciaries of employee benefit plans rely on the information provided by actuaries and expect that the reports rendered by actuaries will be "in the aggregate reasonably related to the experience of the plan and to reasonable expectations," and that each report will "represent [the actuary's] best estimate of anticipated experience under the plan." Section 103(a)(4)(B) of ERISA, 29 U.S.C. § 1023(a)(4)(B).

The question presented to this tribunal is what remedy is available to a pension plan where an actuarial service provider is solely, exclusively and directly responsible for underfunding caused through its negligence and misfeasance. Specifically, this Court is asked to determine whether Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), permits the Trustees to pursue a claim in federal court for compensatory damages against a negligent actuary where there is no allegation of wrongdoing by any fiduciary, or whether the Court of

Appeals correctly determined that such a cause is unavailable, relying on this Court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)("*Mertens*").

Mertens held that ERISA does not authorize suits for money damages against nonfiduciaries who *knowingly participate in a fiduciary's breach of fiduciary duty* under Section 502(a)(3). Writing for the majority, Justice Scalia rejected the argument advanced by petitioners in that case, and determined that the remedy provision contained in Section 502(a)(3) providing "other appropriate equitable relief" was limited to only those forms of relief *typically* available at equity. 508 U.S. 248, 256. The *Mertens* petitioners had argued that, due to ERISA's broad preemption provisions, state court actions which provided compensatory remedies to aggrieved parties would be foreclosed and a restrictive interpretation of Section 502 severely limiting its available remedies would result in *less* protection to beneficiaries as a result of ERISA's enactment. *Id.* at 261.

The *Mertens* majority stated that its description of Section 502 was "not nonsensical; [rather,] it allocate[d] liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." *Id.* at 262. Under the facts of *Mertens*, the majority explained:

> Professional service providers such as actuaries become liable for damages when they cross the line from advisor to fiduciary; must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, *see* § 502(i), 29 U.S.C. 1132(i), or excise taxes, *see* 26 U.S.C. § 4975; and (assuming nonfiduciaries can be sued under § 502(a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees. All that ERISA has eliminated,

> on these assumptions, is the common law's joint and several liability, for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did. . . .
>
> *Id.*[1]

Writing for the dissent, Justice White resolved the anomaly created by the majority's interpretation by simply reading Section 502(a)(3) to encompass monetary damages. As explained by the dissent:

> [T]raditional "equitable remedies" available to a trust beneficiary included compensatory damages. . . .
>
> * * *
>
> Given this history, it is entirely reasonable in my view to construe § 502(a)(3)'s reference to "appropriate equitable relief" to encompass what was equity's routine remedy for such breaches – a compensatory monetary award calculated to make the victims whole, a remedy that was available against both fiduciaries and participating nonfiduciaries.

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[1] This was the result embraced by the United States Court of Appeals for the Second Circuit in the case at bar. *See* Appendix A, at A-10 ("In short, our conclusion that the Plaintiffs have no claim for restitution means that there is no remedy available under ERISA to redress the grievance alleged in their Complaint. We must reverse the judgment of the District Court on this ground."). *See also* Appendix A, at A-6, where the Court cites *Great-West Life & Annuity Ins. Co. v. Knudson*, 543 U.S. 204 (2002) in further support of its restrictive reading of Section 502. The case at bar, however, presents an entirely distinct fact pattern from *Mertens*. Here, there is no allegation that Savasta participated in any breach with any plan fiduciary. Rather, Savasta is alleged to be solely and completely responsible for the losses complained of in the underlying action.

Id. at 266-67. Justice White concluded that "such a reading would avoid the perverse and, in this case, entirely needless result of construing ERISA so as to *deprive* beneficiaries of remedies they enjoyed prior to the statute's enactment." *Id.* at 274.

The justification by the *Mertens* majority for its narrow reading of the remedy provisions contained in Section 502 – that those who exercise control over plan assets are ultimately responsible for damages occasioned through wrongful acts – is entirely fact-dependent and, as in the instant Petition, may prove factually inaccurate. As the facts of the case under consideration make evident, the Trustees of the Pension Fund committed no breach of their fiduciary duties. Indeed, the Trustees followed to the letter the requirements of ERISA that they employ an actuary and make funding determinations based on the report rendered by their enrolled actuary. The harm suffered by the Pension Fund, *to wit*, massive underfunding of vested benefits and economic harm totaling millions of dollars, was occasioned exclusively by the negligence and misfeasance of a non-fiduciary, actuarial service provider. The majority rule in *Mertens* is, therefore, distinguishable, and it is respectfully submitted that the thoughtful analysis provided by the *Mertens* dissent – that ERISA should not effect a deprivation of remedies – should be applied to the case at issue herein. *See also, Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989).

The purpose of ERISA was to provide an element of protection to participants and beneficiaries of employee pension benefit plans. Congress sought to insure that the administration of pension plans was performed honestly and in a fashion required by federal law. *See, e.g., Firestone Tire*, 489 U.S. at 113. Here, the Court of Appeals has relegated to the law of each state any claim that a pension plan may have against a non-fiduciary. *See* Appendix A, at A-21. The role of actuaries in the formulation and administration of pension plans has been

established by ERISA. Under federal law, a pension plan cannot operate without an actuary. *See* Section 103(a)(4)(A) of ERISA, 29 U.S.C. § 1023(a)(4)(A). Yet, when an actuary engages in malpractice or negligence, the Court of Appeals would force pension plans to seek a remedy pursuant to state law. Of course, such remedies will vary according to the law of each state, as will the standards imposed and the proof required to establish liability.

The Court of Appeals, justifying its decision on the rationale offered in *Mertens*, determined in the case under consideration herein that there is no remedy available under ERISA to the Pension Fund. This result, that the beneficiaries of the Pension Fund stand to lose their vested pension benefits and Savasta can continue to render actuarial services with impunity, is not in keeping with the allocation of responsibility dictated by *Mertens*. Rather, *Mertens* was limited on its facts, and this Court should provide guidance for pension plans where nonfiduciaries are solely responsible for damages to funds governed by ERISA, and should grant Certiorari.

CONCLUSION

It is respectfully submitted that Certiorari should be granted specifically to answer this important question of federal law.

Respectfully submitted,

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Dated: August 15, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002

Argued: March 25, 2003 Decided: May 19, 2003

Docket Nos. 02-9005, 02-9007

ALFRED G. GEROSA, JOSEPH MITRIONE, JOHN J. PYLILO, PAUL M. MANITA, ANGELO SCAGNELLI, BERT GALLO, JOHN PAGLIVCA, Trustees, Cement Masons' Local 780 Pension Fund,

Plaintiffs-Appellees-Cross-Appellants,

— v.—

SAVASTA & COMPANY, INC.,

Defendant-Appellant-Cross Appellee,

NEIL J. SAVASTA, MARK SCHOR,

Defendants.

Before:

KATZMANN, B.D. PARKER, JR., AND RAGGI,

Circuit Judges.

Defendant appeals from an interlocutory order of the United States District Court for the Southern District of New York (Hellerstein, J.) denying Defendant's motion to dismiss. Defendant's motion asserted that the remedies sought by Plaintiffs are not available under the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a)(3) (2000). Plaintiffs cross-appeal a different portion of the same order,

dismissing Plaintiffs' state-law claims as preempted by federal law. Both parts of the order are reversed and remanded.

MARK J. ALONSO, Alonso, Andalkar & Kahn, P.C., New York, NY, for *Defendant-Appellant-Cross-Appellee Savasta & Company, Inc.*

RICHARD H. MARKOWITZ (Nancy A. Walker, *on the brief*), Markowitz & Richman, Philadelphia, PA, for *Plaintiffs-Appellees-Cross-Appellants Alfred G. Gerosa, Joseph Mitrione, John J. Pylilo, Paul M. Manita, Angelo Scagnelli, Bert Gallo, and John Pagliuca, Trustees, Cement Masons' Local 780 Pension Fund.*

ELIZABETH HOPKINS, Counsel for Appellate and Special Litigation (Eugene Scalia, Solicitor of Labor, Timothy D. Hauser, Associate Solicitor for Plan Benefits Security Division, Paul C. Adair, Trial Attorney, *on the brief*), U.S. Department of Labor, Office of the Solicitor, Washington, D.C., for *Amicus Curiae Elaine L. Chao, Secretary of Labor.*

KATZMANN, *Circuit Judge:*

The Cement Masons' Local 780 Pension Fund is a retirement benefits plan established under the Employee Retirement Income Security Act ("ERISA"). The Plaintiffs, Alfred G. Gerosa and other trustees of the Fund, allege that, as a result of the negligence of their actuary, the Defendant, Savasta & Company, Inc., the Fund is now dangerously underfunded. Accordingly, they brought suit against Savasta under ERISA's civil enforcement section, 29 U.S.C. § 1132(a)(3) (2000), as well as under several state-law

theories of liability. Following the Defendant's 12(b)(6) Motion, the District Court for the Southern District of New York (Alvin K. Hellerstein, J.) dismissed the Trustees' state-law claims as preempted, but denied the motion to dismiss the claim under ERISA. The District Court's dual determinations relied in large part on our opinion in *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992). Because we now conclude that *Diduck* has been superseded by subsequent decisions of the Supreme Court, we must reverse both holdings and remand for further proceedings.

Background

The individual plaintiffs in this case are each trustees of the Plaintiff, Cement Masons' Local 780 Pension Fund, a multi-employer pension plan organized pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (2000 & Supp. 2002). Among its numerous other demands, ERISA requires the administrator of each plan annually to obtain and publish an "actuarial statement," which is in essence an analysis of the plan's financial condition by a professional actuary. Id. §§ 1023(a)(4)(A), (d).

The Plaintiffs' Complaint, which for purposes of this appeal we accept as true, alleges that in fulfillment of their duties, the Trustees hired the Defendant, Savasta & Company, Inc., to serve as the Plan's actuary and prepare its actuarial statements. In each of its actuarial statements from 1994 through 1997, Savasta reported that the Plan was actually over-funded. (In other words, the Plan's assets were more than sufficient to pay all projected benefits claims.) The Plaintiffs allege that, in reliance on this information, they amended the Plan to distribute the excess funding to the Plan beneficiaries in the form of

improved benefits. Savasta's analysis at the time indicated that, even under the more generous provisions, the plan was still overfunded by a small margin.

Savasta's actuarial statement at the end of the next year, 1998, however, revealed a dramatically different situation. Now, Savasta projected, the Plan's assets would cover only 71.3% of the Plan's projected liabilities. Savasta's explanation for this disparity, according to the Complaint, was that there had been a "data correction." When pressed for more information, Savasta reported that it could not offer any better explanation, because all of its records upon which it had based its pre-1999 calculations were missing.

The Trustees subsequently filed this suit, on behalf of themselves and the Plan, seeking to recover from Savasta the anticipated shortfall between the Plan's liabilities and its assets.[1] The Complaint sought redress under the civil enforcement provisions of *ERISA*, *see* 29 U.S.C. § 1132(a)(3), as well as under state-law theories of promissory estoppel, breach of contract, and professional malpractice.[2]

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[1] The Complaint is not entirely clear whether it seeks compensation only for the shortfall arising out of the 1997 decision to increase benefits. Conceivably, the Plaintiffs might also attempt to prove that, as a result of Savasta's alleged negligence, they failed to set contribution rates at an appropriate level even before the decision to increase benefits was made.

It also bears mention that the Plaintiffs are not now free to reduce already-accrued benefits to affordable levels. *See* 29 U.S.C. § 1054(g)(1) ("The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan. . . .").

[2] Although the Complaint does not include a separate heading for a malpractice tort claim, it describes the basis for Savasta's breach of contract as Savasta's negligent failure to carry out its services "in a professional manner and in accordance with the professional standards applicable to actuaries of employee benefit plans."

Savasta then moved to dismiss the Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the remedies sought by the Plaintiffs are not available under ERISA, and that ERISA preempts the state law claims. The District Court denied the motion to dismiss the ERISA claim, holding that the Plaintiffs could obtain consequential damages under the statute. *See Gerosa v. Savasta*, 189 F. Supp. 2d 137, 152 (S.D.N.Y. 2002). However, the District Court granted the motion to dismiss Plaintiffs' state-law claims, finding them preempted by ERISA. Id. It also granted both parties' motions to file an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). Id. Another panel of this Court agreed that we should hear both Savasta's appeal and the Plaintiffs' cross-appeal. The Secretary of Labor filed an *amicus* brief urging us to reverse the district court, and we invited the Secretary to participate in oral argument.

Discussion

I.

ERISA places great responsibilities upon the fiduciaries of a plan to protect the interests of the plan's beneficiaries. *See, e.g.*, 29 U.S.C. §§ 1101-1112 (describing some responsibilities of ERISA fiduciaries). Correspondingly, it also gives to fiduciaries a wide array of powers to superintend the operation of the plan. Most pertinently for the Plaintiffs here, fiduciaries may bring suit in federal court "to enjoin any act or practice which violates any provision of [ERISA Title I] or the terms of the plan, or . . . to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA Title I] or the terms of the plan."

29 U.S.C. §11132(a)(3).[3] Savasta concedes that some actuarial conduct is regulated by ERISA, and therefore that its negligence is at least arguably an act or practice which violates the statute.[4]

The core of the dispute here is thus not whether ERISA authorizes suit against Savasta, but rather whether the remedy the Plaintiffs seek falls within such "other appropriate equitable relief" as they may obtain. The Complaint asks for an order directing "defendants to reimburse the plaintiffs for the shortfall the Pension Fund will experience as a result of defendants' violation of their duties under ERISA." In determining the propriety of a remedy, we must look to the real nature of the relief sought, not its label. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993).

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[3] ERISA also authorizes fiduciaries to sue other fiduciaries who breach their duties. *See* 29 U.S.C. §§ 1109, 1132(a)(2). There is no allegation here, however, that Savasta acted as a fiduciary. We have previously agreed with the Department of Labor that actuaries, attorneys, and accountants are not ordinarily fiduciaries unless they render investment advice or are given special authority over plan management. *See F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259-60 (2d Cir. 1987) (citing 29 C.F.R. § 2509.75-5 (1986)); *see also Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 21 (2d Cir. 1996). The Department still holds that view. *See 29* C.F.R. § 2509.75-5 (2002) ("[A]ttorneys, accountants, actuaries and consultants performing their usual professional functions will ordinarily not be considered fiduciaries . . . .")

[4] Among other provisions, ERISA states that "the enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion." 29 U.S.C. § 1023(a)(4)(B). The Supreme Court has previously assumed, without deciding, that ERISA provides a right of action against non-fiduciary actuaries in similar circumstances. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254-55 (1993). Since the possibility of a right of action is at least colorable, our jurisdiction is not implicated. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (citing *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)). Therefore, we may accept Savasta's concession. However, because we ultimately hold that, even if there is such a right of action, it cannot benefit the Plaintiffs here, we, too, do not actually decide the question today.

Section 1132(a)(3) permits money awards only in very limited circumstances. Classic compensatory and punitive damages are never included within "other appropriate equitable relief." *Id.*; *see Lee v. Burkhart*, 991 F.2d 1004, 1011 (2d Cir. 1993). With regard to nonfiduciary defendants, we have said that the "only conceivable equitable claim" for cash money lies under the antique equitable remedy of restitution. *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 144-45 (2d Cir. 1999) (citing *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18 (2d Cir. 1996)). In order to make out a claim for restitution, a plaintiff must show that the defendant has unjustly received from the plaintiff a benefit, such as a payment, *see Great-West*, 534 U.S. at 213; *Geller*, 86 F.3d at 22, or that the defendant holds funds or property that in good conscience should belong to the plaintiff, *see Great-West*, 534 U.S. at 213.

We agree with the District Court that the Plaintiffs have not alleged sufficient facts to make out a claim for restitution. The moneys sought by the Plaintiffs were never in Savasta's possession; rather, they are simply consequential damages resulting from Savasta's alleged negligence.[5] Like the defendants in *Geller*, Savasta was never "unjustly enriched," and therefore no restitution claim can lie against it. 86 F.3d at 22.

Although the District Court in its thoughtful decision found that the Plaintiffs have no restitution claim, it concluded, in reliance on our opinion in *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992), that it had the authority to imply a damages remedy under ERISA. *See Gerosa v. Savasta*, 189 F. Supp. 2d 137, 150-52 (S.D.N.Y.

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[5]The Plaintiffs do not appear to assert that the fees they paid to Savasta for duties Savasta performed inadequately can provide the basis for a restitution claim. We therefore need not consider whether such a remedy would be authorized under § 1132(a)(3).

2002). In *Diduck*, 974 F.2d at 274-75, we considered a claim by participants and beneficiaries in an ERISA plan against a non-fiduciary, who was alleged to have knowingly participated in a plan fiduciary's breach of duty. We acknowledged that ERISA does not expressly or even impliedly create a right of action in those circumstances. *See id. at* 280. We found, however, that the underlying purposes of ERISA would be frustrated in the absence of such liability. *See id. at* 281. Accordingly, we concluded that there was a "need for interstitial lawmaking," and determined that we would "recogniz[e] a federal common law right of action in favor of plan participants against non-fiduciaries." Id. at 280-81.

We think, however, that this aspect of *Diduck* has not survived subsequent Supreme Court determinations. In *Mertens*, the Court rejected the central holding of *Diduck*, finding that non-fiduciaries who knowingly participate in a fiduciary breach cannot be liable for ordinary money damages. 508 U.S. at 255; *see also Mullins v. Pfizer, Inc.*, 23 F.3d 663, 666 (2d Cir. 1994) (avoiding *Mertens* problem by assuming defendant was a fiduciary). In rejecting several arguments based on ERISA's general purposes, the Court emphasized ERISA's comprehensiveness, as well as the clear text of the ERISA civil remedies provisions, which in combination it argued provided "'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 508 U.S. at 254, 261 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)). Twice in its most recent term, the Court has repeated its belief that ERISA's express remedies, as the product of long and careful study and compromise, should remain exclusive. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 375-76 (2002); *Great-West*, 534 U.S. at 209. We see little room in this

framework for judicially-created, "interstitial" remedies.

Nor are we convinced by the District Court's efforts to distinguish *Mertens* and *Great-West*. The arguments it offers, although quite thoughtful, are ultimately not in keeping with the Supreme Court's directives. For example, the District Court argued that *Mertens* was not controlling because it believed the purposes of exempting non-fiduciaries from joint and several liability do not apply when the trustees are plaintiffs, not defendants. *See Gerosa*, 189 F. Supp. 2d at 150-51. Similarly, the District Court responded to *Great-West by* pointing to Congress's underlying goals in enacting ERISA. *Id.* at 151-52. *Great-West* is quite explicit, however, that "[i]t is ... not our job to find reasons for what Congress has plainly done." 534 U.S. at 217. That comment, taken in the context of other recent Court opinions applying a strong presumption that creation of an express remedy clearly forecloses others, *see, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001), makes evident that we are no longer free to fill in unwritten gaps in ERISA's civil remedies. Accordingly, whatever may be the truth of the District Court's observation that the *Diduck* approach is "sounder" than the *Mertens* alternative, *Gerosa*, 189 F. Supp. 2d at 150, the Supreme Court has instructed that it is not for us to decide the best ERISA remedial scheme.[6]

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[6] We emphasize that our holding is limited to ERISA's civil remedial provisions. 29 U.S.C. § 1132. In other respects, we continue to carry out Congress's intent that we develop "a federal common law of ERISA based on principles developed in evolution of the law of trusts." *Lee*, 991 F.2d at 1011 (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989)). Nor do we mean to say that common-law principles are never relevant to questions involving remedies. *See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney* Inc., 530 U.S. 238, 250-51 (2000) (analyzing scope of "appropriate equitable relief" by reference to common law of trusts). We hold only that the limited text of ERISA's civil remedies is inconsistent with judicial discovery of new liabilities.

In short, our conclusion that the Plaintiffs have no claim for restitution means that there is no remedy available under ERISA to redress the grievance alleged in their Complaint. We must reverse the judgment of the District Court on this ground.

II.

The Plaintiffs also cross-appeal the District Court's determination that ERISA preempts their state-law claims. In urging us to affirm, Savasta asks us to find, in effect, that Congress intended completely to immunize actuaries from claims for damages. We disagree, and instead join a chorus of the Courts of Appeals in ruling that ERISA does not preempt "run-of-the-mill" state-law professional negligence claims against non-fiduciaries. Again, however, we have occasion to revisit our opinion in *Diduck*, which held to the contrary.

A. The ERISA Preemption Standard

Preemption is fundamentally a question of congressional intent. *See N. Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, *514 U.S. 645, 655 (1995)*. Naturally, as with any matter of Congress's intentions, we must begin with the statutory language. Id.; *see also Rush Prudential, 536 U.S.* at *364-65*. ERISA provides that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § *1144(a)*. As the Supreme Court has recognized, however, ERISA's nearly limitless "relates to" language offers no meaningful guidelines to reviewing judges. *Rush Prudential, 536 U.S.* at *365-66; Travelers, 514 U.S.* at *655-56*. Therefore, "[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress

understood would survive." *Id.* at *656; see also Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997); *Cicio v. Does*, 321 F.3d 83, 93 (2d Cir. 2003). In conducting that analysis, we begin with the assumption that "Congress does not intend to supplant state law," *Travelers*, 514 U.S. at 654-55 (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)), a presumption that is particularly strong for "state action in fields of traditional state regulation," id. (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Amidst the proliferation of lower court opinions attempting to apply the Supreme Court's still not entirely determinate principles, several clear trends have emerged. The most pertinent for our purposes is a focus on the core ERISA entities: beneficiaries, participants, administrators, employers, trustees and other fiduciaries, and the plan itself. Courts are reluctant to find that Congress intended to preempt state laws that do not affect the relationships among these groups. *See, e.g., LeBlanc v. Cahill*, 153 F.3d 134, 147 (4th Cir. 1998); *Ariz. State Carpenters Pension Trust Fund v. Citibank, (Ariz.)*, 125 F.3d 715, 724 (9th Cir. 1997); *In Home Health, Inc. v. The Prudential Ins. Co. of Am., 101* F.3d 600, 605-06 (8th Cir. 1996); *Morstein v. Nat'l Ins. Servs., Inc.*, 93 F.3d 715, 722-23 (l lth Cir. 1996), *cert. denied*, 519 U.S. 1092 (1997); *Airparts Co. v. Custom Benefit Servs. of Austin, Inc.*, 28 F.3d 1062, 1066 (10th Cir. 1994); *Perk-ins v. Time Ins.* Co., 898 F.2d 470, 473-74 (5th Cir. 1990). In addition, state laws that would tend to control or supersede central ERISA functions-such as state laws affecting the determination of eligibility for benefits, amounts of benefits, or means of securing unpaid benefits-have typically been found to be preempted. *See, e.g., Cicio*, 321 F.3d at 95; *LeBlanc*,

153 F.3d at 147 (noting that "Congress intended to preempt state laws providing alternate enforcement mechanisms for employees to obtain ERISA plan benefits") (internal quotations and citation omitted); *Airparts*, 28 F.3d at 1064-65; *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1565 (11th Cir. 1987).

One product of these tendencies has been that courts routinely find that garden-variety state-law malpractice or negligence claims against non-fiduciary plan advisors, such as accountants, attorneys, and consultants, are not preempted. *See, e.g., LeBlanc*, 153 F.3d at 138; *Ariz. Carpenters*, 125 F.3d at 717-18; *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1460 (4th Cir. 1996); *Custer v. Sweeney*, 89 F.3d 1156, 1166-67 (4th Cir. 1996); *Airparts*, 28 F.3d at 1067; *Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1152-53 (3d Cir. 1989); *Harmon City, Inc. v. Nielsen & Senior*, 907 P.2d 1162, 1170 (Utah 1995). The Third Circuit's reasoning in *Philadelphia Painters* is typical. Observing that "state law has traditionally prescribed the standards of professional liability," *Philadelphia Painters*, 879 F.2d at 1152, the court concluded that such suits merely placed the plaintiff ERISA plan in the same position as any other state economic actor, *id.* at 1153 n.7. There was therefore no reason to believe that Congress would have wanted to preempt the claim. *Id.*

Savasta argues, however, that the relationship between a plan and its actuary is not the same as the routine dealings a plan might have with its lawyer or its landlord. ERISA, it claims, sets out a code of behavior for actuaries, which in Savasta's view is enforceable through a suit by a "fiduciary . . . to obtain . . . appropriate equitable relief . . . to enforce any provisions of [ERISA Title I]." 29 U.S.C. § 1132(a)(3). Pointing to the Supreme Court's opinion in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133

(1990), Savasta claims that Congress's decision to provide a remedy, however limited, for actuarial negligence necessarily displaces any state-law regulation of the same conduct.

As in Part I, we assume, without deciding, that ERISA would give the Trustees a claim against Savasta; nevertheless, we are not convinced that Ingersoll controls the outcome of this case. In Ingersoll, the Supreme Court held that ERISA preempted a Texas wrongful discharge statute that had been construed to extend to employees who were terminated because the employer wished to avoid making plan contributions on their behalf. 498 U.S. at 136-37. An existing ERISA provision, 29 U.S.C. § 1140, already targeted the same conduct, and was enforceable through § 1132. The Court thus observed that permitting parallel state actions could expose multi-state employers to several different standards simultaneously, thereby transgressing a central ERISA goal of protecting the planning interests of contributing employers. *Id.* at 142. Another problem with the Texas statute, the Court found, was that "Congress intended § [1132](a) to be the exclusive remedy for rights guaranteed under ERISA." *Id.* at 144 (citation omitted). Otherwise, "'[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.'" *Id.* (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)).

In our view Ingersoll represents not a categorical rule barring state causes of action that might overlap with ERISA, but rather an application of the general principle that preemption depends on whether state remedies are consistent with ERISA's core purposes. Taken alone, the limited language of § 1132 permits

two possible inferences: that the remedies listed are the only remedies available under any law, or merely that the remedies listed are an exclusive enumeration of what can be granted under federal law. Under the latter reading, obviously, parallel state-law remedies would still be permissible. It was ERISA's broad preemption language, along with consideration of its larger purpose in "encouraging the formation of employee benefit plans" through reduced planning costs, that supplied the crucial additional inference in *Ingersoll* that no such state claims could be permitted. *See Ingersoll*, 498 U.S. at 143-44; *see also Rush Prudential*, 536 U.S. at 379 (explaining *Ingersoll* as based on "ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and uniform remedial orders and awards"). However, where there is no comparable statutory objective that would be served by preemption, the ERISA text is open to the possibility that alternate state remedies might be available. Therefore, the extent to which ERISA's remedial provisions preempt state law is not necessarily absolute; as with any provision, preemption must be considered in light of Congress's purposes in enacting the statute.

Our approach finds common ground with the reasoning of several other courts, as well as the implicit logic of one of our prior holdings. For example, in *Trustees of the AFTRA Health Fund v. Biondi*, 303 F.3d 765, 777-79 (7th Cir. 2002), the Seventh Circuit distinguished *Ingersoll* and found that, notwithstanding the possibility of equitable relief under ERISA, a state-law fraud claim by a plan's trustees against a participant was not preempted, because "the Trustees' common law fraud claim does not implicate any of ERISA's fundamental concerns." Similarly, in *LeBlanc*, the Fourth Circuit allowed a common-law fraud claim by a set of

trustees against the plan's investment advisor to proceed because it found that such claims would "not undermine any of ERISA's objectives." 153 F.3d at 147. This in spite of the fact that the plaintiffs also had a claim under ERISA. *Id.* at *148.* An earlier Fourth Circuit opinion appears to view the existence of an "alternative enforcement mechanism" as a basis for preemption only (or at least most forcefully) when it allows an alternate avenue for *employees* to sue. *Coyne & Delany*, 98 F.3d at 1471. In *Geller*, we likewise permitted the plaintiff's state-law fraud claim to stand, regardless of some available equitable remedies under ERISA, *see* 86 F.3d at 21-23, because "the preemption provision should not be read to contravene the statute's underlying design," *id.* at 23.[7] *But see Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1219 (9th Cir. 2000) (stating that "a core factor leading to the conclusion that a state law claim is preempted is that the claim bears on an ERISA-regulated relationship") (citing *Blue Cross of Cal. v. Anesthesia Care Assocs. Med. Group, Inc.*, *187* F.3d 1045, 1053 (9th Cir. 1999)), *cert. denied*, 531 U.S. 992 (2000); cf. *Smith v. Provident Bank*, *170* F.3d 609, 617 (6th Cir. 1999) ("When an ERISA plan's relationship with another entity is not governed by ERISA, it is subject to state

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[7] We have also recently determined that at least some state medical malpractice claims against plan administrators are not preempted by ERISA. *See Cicio*, 321 F.3d at 102-03. That decision is not directly on point, because it "involve[d] the application of duties of conduct that are defined independent of ERISA plans," id. at 99-100, rather than, as here, duties that are arguably defined by ERISA itself. Nonetheless, it is worth noting that we there expressed "our skepticism of a line of reasoning that would draw from 'a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans' the elimination of protective standards of professional conduct." Id. at 103-04 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)).

law." (citing *Mich. Affiliated Healthcare Sys., Inc. v. CC Sys. Corp. of Mich.*, 139 F.3d 546, 550 (6th Cir. 1998))); *Ariz. Carpenters*, 125 F.3d at 722-24).

Finally, we think the Supreme Court's discussion of *Ingersoll in Rush Prudential*, although offered in a slightly different context, is consistent with our approach. The *Rush Prudential* Court held that an Illinois statute providing for independent review of disputes between HMOs and primary-care physicians was not preempted, even though ERISA, too, offered a remedy for complaining beneficiaries. *See* 536 U.S. at 359. It distinguished *Ingersoll* by pointing out that the Illinois law "provides no new cause of action under state law and authorizes no new form of alternate relief." *Id.* at 379. In essence, then, the argument was that *Ingersoll's* apparent presumption against additional, non-ERISA remedies did not apply where the result of the alternative state enforcement scheme constituted no more than "'indirect economic effects'" on the administration of a plan. *Id.* at 381 n. 11 (quoting *Travelers*, 514 U.S. at 659). That is, while some alternative remedies interfere with central ERISA purposes, and are therefore preempted, others do not, and therefore are not.

However, before moving on to the question of Congress's intent in this case, we must pause to consider the status of our opinion in *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992). The question there, again, was whether we would permit damages under § 1132(a)(3) against non-fiduciaries who knowingly participate in a breach of fiduciary duty. A critical factor in our affirmative answer to that question was our conclusion that, because ERISA provided equitable relief in those circumstances, any state-law damages remedy would be preempted. *Diduck*, 974 F.2d at 281. We appear to have based that belief on our observation that "ERISA broadly preempts state law causes of action that

'relate to' an ERISA-regulated plan," *id.* at 280 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983)), as well as upon a Ninth Circuit opinion that had reached a similar determination, *id.* at 281 (citing *Gibson v. Prudential Ins. Co. of Am.*, 915 F.2d 414, 417-18 (9th Cir. 1990)). Thus the *Diduck* rule,[8] if applied in this case, might require us to find that the Plaintiffs' claims are preempted.

Our preemption analysis in *Diduck*, however, is no longer consistent with prevailing Supreme Court precedent. Indeed, several of our sister circuits have noted that *Travelers* occasioned a significant change in preemption analysis, and required careful reconsideration of any preexisting precedent dependent on the expansive view of "related to" that held sway before it. *See AFTRA*, 303 F.3d at 773; *Ariz. Carpenters*, 125 F.3d at 723; *Coyne & Delany*, 98 F.3d at 1469 n.14; cf. Cicio, 321 F.3d at 99 ("[T]he Supreme Court has . . . thrown 'cold water' on the idea that state regulation of health and safety is necessarily preempted even when it overlaps with rights protected by ERISA." (quoting *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000))). In one case a

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[8] We are not certain that *Diduck*'s observations can be minimized as dicta or distinguished. Although there was no state law claim in *Diduck*, the court's assumption that damages would not be available under state law was essential to its reasoning. *See* 974 F.2d at 281. It is true that *Diduck*'s comment that "the availability of equitable relief against non-fiduciaries" requires preemption, *id.*, might conceivably be limited to the facts of the case—i.e., where the defendant non-fiduciaries are participating in a fiduciary breach. Our reliance, however, on the Ninth Circuit's expansive holding in *Gibson*, 915 F.2d at 417-18 ("The existence of some remedy for misconduct by nonfiduciaries suggests that Congress intended to include their behavior under ERISA."), and our earlier pronouncements in *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 9 (2d Cir. 1992) ("[A] state law of general application, with only an indirect effect on a pension plan, may nevertheless be considered to 'relate to' that plan for preemption purposes."), suggest that in fact we simply took a very broad view of preemption.

panel actually reconsidered its initial holding based on the intervening *Travelers* opinion, concluding that in light of the new standard there was no preemption. *See Ariz. Carpenters*, 125 F.3d at 723. Subsequent Supreme Court opinions have continued to adhere to the less-expansive view of preemption outlined in *Travelers*. *See, e.g., Rush Prudential*, 536 U.S. at 381 n.11; *Egelhoff*, 532 U.S. at 146-47. It is true that not all of our *pre-Travelers* opinions necessarily embraced an expansive notion of preemption. In one case, we anticipated *Travelers*, noting that we would not supersede "the historic police powers of the States . . . unless that was the clear and manifest purpose of Congress." *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 144-45 (2d Cir.) (internal quotation marks and citation omitted), *cert. denied*, 493 U.S. 811 (1989). At this remove, however, it would be difficult to sort out from Diduck considerations the Supreme Court has disavowed from those that might still be permissible. *Cf. Travelers Ins. Co. v. Cuomo*, *14* F.3d 708, 719 (2d Cir. 1993) (rejecting argument based on previous panel opinion because earlier analysis was "poisoned" by view since discredited by the Supreme Court), *rev'd sub nom. N. Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). We also note that the broad view of preemption appearing in *Diduck* is difficult to reconcile with our subsequent and narrower interpretation in *Geller*, 86 F.3d at 23. We therefore conclude that, to the extent that *Diduck* is not distinguishable here, it has, in any event, been superseded.

B. Whether Congress Intended to Preempt the Trustees' Claims

We now come, at long last, to Congress's intent. Again, we begin with the presumption that Congress does not intend to displace state law, especially in

traditional areas of state control. *Travelers*, 514 U.S. at 654-55. Regulating the professions, particularly under a rubric of professional malpractice, is a traditional state function. *See Custer v. Sweeney*, 89 F.3d 1156, 1167 (4th Cir. 1996); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 540 (7th Cir. 1991); *Philadelphia Painters*, 879 F.2d at 1152-53; *Harmon City*, 907 P.2d at 1170.

ERISA's principal goal is to "protect ... the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b); *see Boggs v. Boggs*, 520 U.S. 833, 845 (1997). This is not to say that beneficiaries must necessarily prevail in every dispute. Ultimately, as the Supreme Court has observed, the long-term interests of beneficiaries may be better served by offering prospective participating employers a measure of-certainty and shelter from undue administrative and litigation costs. *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Thus, the planning interests and administrative burdens of employers and plan administrators are also a significant ERISA concern. *See Travelers*, 514 U.S. at 657 (noting that "[t]he basic thrust of the pre-emption clause [is] ... to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans").

We see relatively little in the central purposes of ERISA that would weigh in favor of preempting the Plaintiffs' claims. Savasta echoes the District Court in arguing that state resolution of disputes between plans and actuaries will necessarily involve the interpretation and application by various state courts of ERISA's actuarial standards, and (presumably) thereby at least complicate employers' and administrators' planning. First, even assuming that ERISA does create any meaningful and enforceable standards for actuarial behavior, those provisions have little to do with the conduct of the plan or its

sponsors. *See LeBlanc v. Cahill*, 153 F.3d 134, 147–48 (4th Cir. 1998). There is no danger, for instance, that the plan will be subject to two sets of inconsistent state obligations. Id. And, as we have said, ERISA does not create a "fully insulated legal world" for plans; they must deal with outsiders, such as landlords or debt-collectors, under the same diverse hodge-podge of state law as any other economic actor. *Rebaldo v. Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985); *see also LeBlanc*, 153 F.3d at 148 (rejecting preemption argument where "the Pension Fund is simply in the role of an investor allegedly wronged").

Savasta's argument may be, though, that ERISA demands that the core ERISA entities must have certainty as to the standards that will bind their actuaries, if not other outside actors. That is, one of ERISA's express purposes is to ensure "the disclosure and reporting to participants and beneficiaries of financial and other information" pertinent to benefit plans. 29 U.S.C. § 1001(b). Actuaries, plainly, play an important role in such disclosures. If ERISA's actuarial provisions are enforceable, though, they guarantee at least a floor of responsible reporting standards. State standards, while possibly inconsistent with one another, could only add to the protections afforded to the plan and its beneficiaries. Nor is there any real danger that state interpretation of certain ERISA provisions affecting actuarial conduct-for example, by construing the failure to adhere to them as negligence *per se* under state law-would undermine federal control. Cf. *AFTRA*, 303 F.3d at 780-81 (rejecting argument that state interpretation of ERISA plan provisions requires preemption of state claim); *Coyne dc Delany*, 98 F.3d at 1471-72 (same). Even crediting the assumption that exclusive federal jurisdiction ensures a relatively uniform and predictable set of law (an assumption

that the history of ERISA caselaw surely undermines), a state interpretation would not interfere with that purpose, because (other than as to the same parties) it would not bind subsequent federal courts. More significantly, the Secretary of Labor is empowered to issue authoritative interpretations of any term in ERISA's actuarial conduct provisions. *See* 29 U.S.C. § 1135. The Supreme Court has entrusted other agencies with centralizing potentially disharmonious court rulings, *see Braxton v. United States*, 500 U.S. 344, 348-49 (1991), and we are confident that we may do the same.

More problematic for Savasta's argument is the fact that it is liability, not immunity, which ultimately can help ensure that the reporting and disclosures demanded by ERISA are made accurately. As this case graphically illustrates, the "appropriate equitable relief" authorized by § 1132(a)(3) will rarely have any meaningful deterrent effect on negligent actuaries, since such relief cannot compare to a common-law action for damages as a stimulant to adherence to the appropriate level of professional performance. True, there are other formal and informal sanctions, such as suspension or termination by the Joint Board for the Enrollment of Actuaries, 29 U.S.C. §§ 1241-42, or damage to a firm's professional reputation. *But* such broad disincentives operate with uncertain force in particular instances, especially when highly out of proportion (in either direction) to the negligence or malfeasance. Suspension and termination also rely on the scarce resources of the Department of Labor, which although not inconsiderable, are tiny compared to the huge number of plans now in existence. It is highly implausible that a Congress interested in disseminating precise and meaningful plan information would intentionally minimize the incentives for careful behavior of one of the primary

guardians of reliable, objective data. *Cf. Morstein v. Nat'l Ins. Servs., Inc.*, 93 F.3d 715, 723 (11th Cir. 1996) (rejecting preemption of state fraud claim where it would undermine employer's ability "to rely on the representations of the ... agent regarding the terms of the plan").

Furthermore, immunizing actuaries could harm the financial integrity of the plans Congress intended to protect. As the allegations here illustrate, careless actuarial work can cause plans serious financial damage. Our earlier discussion also demonstrates that ERISA's equitable remedies often do not provide make-whole relief, so that the result urged by Savasta would leave the affected plan with no means for making up its shortfalls. Again, we find it implausible that Congress intended such results. Cf. *AFTRA*, 303 F.3d at 781-82 (arguing that absence of remedial damages under ERISA was-a factor weighing against preemption of state tort claim); *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 149 (2d Cir. 1999) (noting that Supreme Court has "evidence[d] a clear intention to avoid construing ERISA in a manner that would leave beneficiaries . . . without any remedy at all"); In H*ome Health, Inc. v. The Prudential Ins. Co. of* Am., 101 F.3d 600, 606-07 (8th Cir. 1996) (holding that rule leaving health-care providers with no remedy against plan would be contrary to Congress's intentions because it would result in higher costs and other inconveniences to beneficiaries) (citing *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 247-48 (5th Cir. 1990)); *Geller*, *86* F.3d at 23 ("'[I]nsuring the honest administration of financially sound plans' is critical to the accomplishment of ERISA's mission. "' (quoting *Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914 (2d Cir. 1982))); *Diduck*, 974 F.2d at 281 (recognizing that foreclosing damages remedy would interfere with "compelling federal interest in ensuring that employee

benefit plan participants and beneficiaries obtain the benefits to which they are entitled"). *But* cf. *Rutledge*, 201 F.3d at 1222 n.13 ("[T]he unavailability of a particular remedy does not undermine ERISA preemption.").

We therefore conclude that, especially in light of our presumption in favor of preserving traditional state law, Congress cannot have intended to preempt the Trustees' unexceptional state-law claims. Any other result would threaten the very purposes Congress had in mind when it enacted ERISA.

The judgment of the District Court is Reversed and Remanded for further proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALFRED G. GEROSA, JOSEPH MITRIONE, JOHN J. PYLILO, PAUL M. MANTIA, ANGELO SAGNELLI, BERT GALLO, and JOHN PAGLIUCA, Trustees, Cement Masons' Local 780 Pension Fund, Plaintiffs,	:	**OPINION AND ORDER DENYING MOTION TO DISMISS**
-against-	:	01 Civ. 1761 (AKH)
NEIL J. SAVASTA, MARK SCHOR, and SAVASTA AND COMPANY, INC., Defendants.	:	

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiffs, the trustees of an employee benefit fund, sue the fund's actuary to recover damages caused by the actuary's negligence. The actuary, in analyzing and reporting on the fund's actual and expected experience, reported that the fund was over-funded and recommended to the trustees that they increase benefits payable to participants and beneficiaries. A year later, the actuary reported that it had erred, that the fund actually had been underfunded, and that the data that it had used to arrive at its erroneous report and recommendation could not be located. The trustees then filed this lawsuit to recover the substantial damage caused to the fund by the actuary's negligence.

I am asked to decide whether the trustees' lawsuit is governed by federal law, cognizable only in a federal district court, or whether it is governed by state law. I

hold that the governing law is federal, that the federal district courts have exclusive jurisdiction to hear it, and that plaintiff, with an amendment, is able to state a legally sufficient claim for relief under ERISA.[1]

I am well aware that my opinion does not follow the trend of recent decisions of the United States Supreme Court. I come to my decision because I believe that ERISA requires it, because the fact pattern in the case before me makes it distinguishable from the Supreme Court decisions, and because it conforms to the reasoning of an earlier decision of the Second Circuit Court of Appeals.

I. The Allegations of the Complaint

Plaintiffs are trustees of a multi-employer, defined benefit pension plan, the Cement Masons Local 780 Pension Fund. As trustees, they engaged defendant, Savasta and Company, Inc., to perform actuarial services for the plan. Defendant, after performing actuarial studies, expressed the opinions that the plan was over-funded, that it had been so for several years, and that the benefits payable to its participants and beneficiaries should therefore be increased. Defendant's written benefit study report found that the plan's vested benefit fund ratio was 128% as of December 31, 1994, 110.8% as of December 31, 1995, and 110% as of December 31, 1996. Defendant's report calculated that the increase in defined benefits that it recommended would leave the fund with a benefit fund ratio which still exceeded 100%.

Plaintiffs accepted the recommendation on December 18, 1997, and increased the defined benefits

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[1] At argument, plaintiffs withdraw their claims against the actuary's principals, Neil J. Savasta and Mark Schor. My accompanying order instructs the clerk to dismiss them and to reform the caption to reflect that Savasta and Company, Inc. will be the only remaining defendant.

of the beneficiaries. Defendant's post-action review found that the plan remained with an overfunded ratio of 102.4%.

In fact, however, the plan was under-funded, and the increase in defined benefits that the trustees put into effect, relying on defendant's report and recommendation, caused the underfunding to be substantially larger. As of the year ended December 31, 1998, defendant determined that the plan's vested benefit fund ratio was not 102.4%, as it had calculated the year before, but only 71.3 %. Defendant now expressed its actuarial opinion that "the assets of the fund are not sufficient to cover the cost of all vested benefits . . . [imposing] a further obligation on the part of the Contributing Employers in the event of a plan termination."

Plaintiffs sued, alleging that defendant was negligent and, as a result, plaintiffs "anticipate the fund will not be able to afford" the pension obligations that will inexorably become due, and that they are "forced to assume significant increases in liabilities that the Pension Fund anticipates that it will not be able to afford." The complaint alleges that defendant has failed to supply the data upon which its actuarial reports relied, claiming that they were lost. Plaintiffs allege that defendant violated its duties as plan actuary, and that the fund of which plaintiffs are fiduciaries suffered damage as a result of defendant's negligence.

Plaintiffs allege three claims to recover from defendant's malpractice: (1) a federal claim under ERISA,[2] and state claims for (2) promissory estoppel, and (3) breach of contract. Defendants move to dismiss

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2 Plaintiffs federal claim seeks restitution. I held at argument that the claim was miscast, and I consider it one for damages. Tr. Arg. at pp. 24-25; see n. 4, infra. Plaintiffs are directed to amend their complaint accordingly.

plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing: (1) plaintiffs failed to plead an actual, concrete injury, (2) plaintiffs' ERISA claim is not authorized by the terms of the Act, and (3) that plaintiffs state law contract claims are preempted by ERISA.

With regard to defendant's first argument, Plaintiffs represent that they are able to prove actual, quantifiable damage: the amount necessary to restore the plan on an actuarial basis to a properly funded basis. I therefore hold that Plaintiffs can satisfy the liberal standards for amending a pleading at the inception of a case, and I grant them leave to amend in this respect. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

As thus amended, I hold that plaintiffs' claim for relief under ERISA is legally sufficient and, in consequence, that plaintiffs' second and third claims for relief are preempted and, thus, dismissed.[3]

II. The Relevant Statutory Provisions and the Congressional Purpose

The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., comprehensively regulates employee benefit plans established by labor and management for the benefit of employees. To accomplish this end, the Act defines the actors and concepts central to the formation and management of benefit plans, sets out the duties and responsibilities of those actors, and provides rights to sue and an exclusive federal forum. The relevant provisions are set out below.

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[3] Conversely, if I were to hold that ERISA does not permit plaintiffs' suit as a federal claim, plaintiffs would be able to state a claim under New York law in the New York Supreme Court.

A. Fiduciaries, Accountants and Actuaries

Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), defines a "fiduciary "of an ERISA plan as a party who:

> (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) . . . renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan . . . or (iii) . . . has discretionary authority or discretionary responsibility in the administration of such plan.

The instrument that creates an employee benefit plan is required to provide for one or more named fiduciaries who jointly or severally are to have the authority to control and manage the operation and administration of the plan and to employ people to give them advice. ERISA §402, 29 U.S.C. §1102. The fiduciaries are to discharge their duties solely in the interest of the participants and beneficiaries, without conflicting transactions, and with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man . . . would use . . . ." Id. §§404, 406, 29 U.S.C. §1104, 1006. They may be liable for each other's breaches of fiduciary duty if they know of them and fail to make reasonable efforts to remedy the breach, or if they knowingly participate in, or conceal, the breach. Id. §405, 29 U.S.C. §1105. Fiduciaries who commit breaches of their duties "shall be personally liable to make good" any losses and to restore "any profits of such fiduciary," and shall be subject to other equitable or remedial relief." Id. §409, 29 U.S.C. §1109.

One of ERISA's central purposes was to assure full and proper disclosure with respect to the

"establishment, operation, and administration" of employee benefit plans. ERISA §2, 29 U.S.C. §1001. To that end, section 103 of ERISA, 29 U.S.C. §1023, provides detailed requirements governing such disclosures. "Independent qualified public accountants" and "enrolled actuaries" are to be engaged, and annual reports are to be filed containing their statements and opinions. Id. §§ 103(a)(3)(A), (a)(4)(A), 29 U.S.C. §§ 103(a)(3)(A), (a)(4)(A). As to the "enrolled actuary," the opinion to be contained in the Annual Report is to the effect that the matters reported on "are in the aggregate reasonably related to the experience of the plan and to reasonable expectations," and that they "represent his best estimate of anticipated experience under the plan." Id. § 103(a)(4)(B), 29 U.S.C. § 1023(a)(4)(B). The annual "statement" of the "enrolled actuary" is to include a "valuation" based on costs, liabilities, benefits, actuarial assumptions and methods used to determine costs, justifications for changes in actuarial assumptions of cost methods, numbers of retired and nonretired participants and beneficiaries, current and present value of accumulated assets and actuarial assumptions of contributions required for "minimum funding standards," ERISA § 302, 29 U.S.C. §1082, present values of nonforfeitable benefits for participants and beneficiaries and actuarial assumptions and techniques used in determining such values, and the like, including "such other information as may be necessary to fully and fairly disclose the actuarial position of the plan." ERISA §103(d), 29 U.S.C. §1023(d).

Thus, section 103(a)(4)(B) provides:

> The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported

> under subsection (d) of this section—(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and (ii) represent his best estimate of anticipated experience under the plan.

And thus, section 103(d) provides that the contents of the "Actuarial Statement" in each benefit plan's annual report shall include:

> (3) [t]he normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required. . . . (5) [t]he present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required . . . and a statement explaining the basis of such valuation. . . . (7) [a] certification of the contribution necessary to reduce the accumulated funding deficiency to zero. . . . (8) [a] statement by the enrolled actuary—(A) that to the best of his knowledge the report is complete and accurate, and (b) the requirements of §302(c)(3) (relating to reasonable actuarial assumptions and methods) have been complied with. . . . [and] (13) [s]uch other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

An actuary is not normally a fiduciary; an actuary can be considered a fiduciary only if he exercises authority or control or discretion over the plan, or renders investment advice concerning plan assets. See 29 C.F.R. § 2509.75-5 (1986) ("attorneys, actuaries and

consultants performing their usual professional functions will ordinarily not be considered fiduciaries" unless they give investment advice or have discretion over plan management); F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1259-60 (2d Cir. 1987) (plan attorney held not a fiduciary under the regulations where he did not exercise authority or discretion over plan assets or management). Plaintiffs have not alleged that defendant was engaged to perform, or did perform, anything other than actuarial services.

B. Provisions Governing Civil Suits Under ERISA

Section 502 of ERISA, 29 U.S.C. §1132, authorizes civil actions to enforce the Act and employee benefit plans organized thereunder. Subsection (a) provides specifically who may sue, for what, and against whom. The relevant provisions are as follows:

> (a) Persons empowered to bring a civil action.
>
> A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this

> subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Thus, under these provisions, a fiduciary is given the right to sue "for appropriate relief under section 1109" (i.e., for damages and to recover improper gain), and for injunctive and "other appropriate equitable relief" to redress violations or enforce ERISA. Id. §§ 502(a)(2), (3), 29 U.S.C. §§1139(a)(2), (3).

C. Jurisdiction and Preemption

The United States district courts have "exclusive jurisdiction of civil actions under [ERISA]," without respect to amounts in controversy or citizenship of parties, whether brought by the Secretary or by a participant, beneficiary, fiduciary, or other enumerated person. ERISA §§ 502(e), (f), 29 U.S.C. §§ 1132(e), (f). Two exceptions are provided: actions for benefits by participants or beneficiaries, and actions by a State for medical child support orders. Id. §§ 502(a)(1)(B), (a)(7), 29 U.S.C. §§ 1132 (a)(1)(B), (a)(7).

ERISA also supersedes "all State laws insofar as they relate . . . to any employee benefits plan" governed by ERISA, with some inapplicable exceptions.

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State law insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

ERISA § 514(a), 29 U.S.C. § 1144(a). "State Law" is defined to include "all laws, decisions, rules,

regulation, or other State action having the effect of law." Id. § 514(c), 29 U.S.C. §1144(c).

D. The Congressional Purpose

Congress, after lengthy studies, proposed that ERISA should prescribe legislative remedies for the various deficiencies of the preexisting private pension plan systems. S. Rep. No. 93-127, at 1 (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4838, reprinted in 1 Subcommittee on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, at 587 (Comm. print 1976) (hereinafter Leg. Hist.). The legislation was intended to impose specified and required standards of vesting, funding, reinsurance, disclosure and fiduciary standards, and to create an Office of Pension and Welfare Administration in the Department of Labor to implement these standards. Id. Pensions to employees were a form of remuneration for labor, and a mandatory subject of collective bargaining. Id. at 3, reprinted in 1 Leg Hist. at 589 (citing Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948)).

The bill that the Committee developed was proposed as a comprehensive private pension reform program, to enable American workers to look forward to financial security and dignity in their retirement, and to increase economic stability of pension plan assets. The legislation was intended to establish "minimum standards and safeguards for private pensions," that would be "sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many." Id. at 13, reprinted in 1 Leg. Hist. at 599. The bill was to represent "an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which

will adequately protect their rights and just expectations." Id. The bill was modeled after the National Labor Relations Act and other labor standards laws. Id. at 14, reprinted in 1 Leg. Hist. at 600.

The bill proposed by the Senate provided a "uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports." The standards proposed by Congress were to be enforceable by a "full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles." The measures were intended to eliminate those obstacles, for in the past they had "hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants. Id. at 35, reprinted in 1 Leg. Hist. at 621.

The Conference Report placed further emphasis on the roles of actuaries in assuring that employers satisfy minimum funding requirements or become subject to a special excise tax, and that any surplus of funding by the employee would receive proper credit. H.R. Conf. Rep. No. 93-1280, at 284, reprinted in 1974 U.S.C.C.A.N. 5038, 5065 (1974), reprinted in 3 Leg. Hist. at 4551. The Conference Report described how the separate rules provided by the Senate and the House bills were combined by the Conference Committee, to the end that "all plan costs, liabilities, rates of interest, and other factors under the plan are to be determined on the basis of actuarial assumptions and methods which, in the aggregate, are reasonable." Id. The Conference Committee stated that the actuarial assumptions, after taking into consideration "the experience of the plan and reasonable expectations," were to offer "the actuary's best estimate of anticipated experience," under "a single set of actuarial

assumptions" for all actuarial purposes. Id. at 284-85, reprinted in 3 Leg. Hist. at 4551-52.

The Conference Committee acknowledged that the bill, although comprehensive, was "not perfect." As Representative Perkins told his colleagues in the House, "On a bill so vastly complicated some consequences are almost certainly unforeseen and some problems will arise, but we will continue vigorous oversight of the act." 120 Cong. Rec. 29192, 29193 (1974), reprinted in 3 Leg. Hist. at 4658 (H.R. floor debate on conference report, Aug. 20, 1974).

The Conference Committee also focused on the preemption provisions of the Act. Except for narrow specified exceptions, "the substantive and enforcement provisions of the conference substitute [were] intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. 29928, 29933 (1974), reprinted in 3 Leg. Hist. at 4745-46 (Senate floor debate on conference report, Aug. 22, 1974). The Conference Committee emphasized that it intended to apply this principle of preemption "in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." Id. The federal interest was to be "comprehensive and pervasive," and "the interests of uniformity with respect to interstate plans required — but for certain exceptions — the displacement of State action in the field of private employee benefit programs." Id. at 29942, reprinted in 3 Leg. Hist. at 4771. The Conference Committee intended "that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." Id.

III. Discussion

A district judge may dismiss a complaint challenged by a Rule 12(b)(6) motion, Fed. R. Civ. P. 12(b)(6), only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." D'Alessio v. New York Stock Exchange, Inc., 258 F.3d 93, 99 (2d Cir. 1991). All material allegations of the complaint are to be accepted as true, and all reasonable inferences are to be drawn in favor of the nonmoving party. Id. However, the court need not accept allegations which are contradicted by documents referenced in the complaint. See DeJesus-Keolamphu v. Village of Pelham Manor, 999 F. Supp. 556, 563 (S.D.N.Y. 1998). And a district judge is not required to accept a complaint as styled when, fairly read, the facts alleged give rise to a different claim for relief.

A. ERISA as a Comprehensive and Reticulated Statute

The United States Supreme Court regards ERISA as a "comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993) (Scalia, J.). Citing its earlier decision, Massachusetts Mut. Life. Ins. Co. v. Russell, 473 U.S. 134, 146-47 (1985), the Supreme Court "emphasized" its "unwillingness to infer causes of action in the ERISA context," and ruled that the "carefully crafted and detailed enforcement scheme" provided by the statute was "'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." Mertens, 508 U.S. at 254 (quoting Russell, 473 U.S. at 146-47.

In Mertens, a class of beneficiaries under an ERISA plan sued the fiduciaries of the plan for allowing the plan to be stripped of assets, and the actuaries for

knowingly participating in and aiding and abetting the fiduciaries' wrongs. Kaiser Steel Corp., the sponsor of the plan, had encouraged early retirement of employees in a steel plant that was soon to be shut down. However, the trustees, helped by the actuaries, did not adjust the plan's actuarial assumptions to account for the consequences: earlier payment of benefits, reduced levels of contributions, loss of investment income, and short term increases in expenses. In consequence, the plan became underfunded and unable to satisfy benefit obligations. The Pension Benefit Guarantee Corporation terminated the plan, and reduced pensions to the stipulated minima guaranteed by ERISA. The beneficiaries, as a class, sued to recover their loss.

The district court dismissed the complaint against the actuaries, and the Court of Appeals for the Ninth Circuit affirmed in relevant part. The Supreme Court granted certiorari on the question whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty.

The Supreme Court held that the actuaries were not acting as fiduciaries and could not be sued as such, that ERISA did not authorize beneficiaries to sue non-fiduciaries for money damages, and that styling the action as an action for equitable relief did not change its character as an action at law. The Supreme Court ruled that professional service providers to ERISA plans, such as actuaries, would become liable for damages only "when they cross the line from advisor to fiduciary." The intent of the statute, the Supreme Court held, was to limit liability for money damages to "persons who had . . . real power to control what the plan did." Id. at 262. There was tension between ERISA's twin goals of benefitting employees and containing pension costs, and Congress wished

not to "impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." Id.

The beneficiaries argued that the common law of trusts recognized the right of beneficiaries to sue non-fiduciaries who knowingly participate in the wrongs of fiduciaries, that such actions would now be preempted by ERISA, and that ERISA should not be interpreted to give beneficiaries less protection than existed before ERISA. Id. at 261. The Supreme Court nevertheless held for dismissal, reasoning that ERISA was "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs." Id. The Supreme Court noted that it was not deciding whether or not "previously available state-court actions" were preempted by ERISA. Id.

Before Mertens, the Second Circuit Court of Appeals expressed a somewhat different view of the law. In Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 281 (2d Cir. 1992), the shop steward of a union, who was also a trustee of two ERISA Funds, failed to obtain contributions payable by the employer for employees who, as off-the-book immigrants, were not members of the union. The participants and beneficiaries of the ERISA Funds brought suit, alleging fraud on the part of the shop steward, in dereliction of his duties as a trustee and ERISA fiduciary. Plaintiffs alleged also that the employer knew of the fraud, and participated in it and benefitted from it, giving rise to joint and several liability with the fiduciary.

The Court of Appeals held for the plaintiffs, against the shop steward and trustee for his breach of fiduciary duty and, jointly and severally, against the employer for knowingly participating in the ERISA fiduciary's breach of duty.

The Court of Appeals recognized that under the "plain terms" of the statute, ERISA actions to recover damages for breach of fiduciary duty "lie only against the fiduciary who breaches such a duty" and co-fiduciaries who knowingly participate in or conceal the breach. Id. at 279-280; see ERISA, §§ 405, 409, 502(a)(2), 29 U.S.C. §§ 1105, 1109, 1132(a)(2). The Court of Appeals recognized also that "ERISA is a comprehensive and reticulated statute," and that "a court should be wary of reading into it remedies in addition to those expressly set forth." Diduck, 974 F.2d at 279 (citing Russell, 473 U.S. at 146-148). However, the Court of Appeals ruled, "Congress wanted federal courts to fill any gaps in the statute by looking to traditional trust law principles," and "a federal common law right of action should be recognized" if "consistent with ERISA's scheme and [to] further its purposes." Id. at 280.

The Court of Appeals considered that the broad preemption provisions of ERISA strongly supported its approach. Under section 514(a) of ERISA, 29 U.S.C. § 1144(a), ERISA is to "supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA] employee benefit plan." If the courts were to hold that suits might not lie under ERISA against nonfiduciaries, yet consider such suits preempted by the broad supersession language of section 514(a), the result would be anomalous, for then there would be no action at all to recover for wrongs caused by non-fiduciaries. "Congress could not have aimed to preempt such actions" if it did not authorize them, by judicial interpretation if not by explicit provision." See Diduck, 974 F.2d at 280-81. "Congress' scheme of bringing uniformity to the area of employee benefit plans would be undermined insofar as the conduct and liability of non-fiduciaries would be assessed by varying state laws, while the conduct and liability of the fiduciary . . . would be governed by federal law." Id. at 281.

Accordingly, the Court of Appeals held that recognizing an action against non-fiduciaries for aiding and abetting a breach of fiduciary duty furthered the goals of ERISA to establish a uniform federal standard for non-fiduciary liability and to protect employees benefit plans. Id.; see also DeLaurentis v. Job Shop Tech. Servs., Inc., 63-64 (E.D.N.Y. 1996) (following Diduck even after Mertens). Mertens, however, not Diduck, is the controlling authority on aiding and abetting liability and, under Mertens, an actuary who knowingly participates in a fiduciary's breach of duty may not be sued along with the fiduciary. As Mertens held, section 502 of ERISA, 29 U.S.C. § 1132, does not provide explicitly for suits by fiduciaries against non-fiduciaries to recover damages. And "equitable relief," the Supreme Court has held more recently, that is, the right given to fiduciaries by section 502 to sue both fiduciaries and non-fiduciaries "to enjoin any act or practice" which violates the Act or the terms of an ERISA plan, or to obtain "other appropriate equitable relief to redress such violation," or "to enforce any provision" of ERISA, see ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), is not an elastic term, but is to be construed according to its narrow and technical meaning. See Great-West Life & Ann. Ins. Co. v. Knudson, 534 U.S. 204, __, 122 S.Ct. 708, 712-16 (2002) (an employee benefit plan may not sue to be subrogated to a beneficiary's insurance recovery or to be reimbursed by the beneficiary for benefits paid and recovered twice by the beneficiary, since ERISA does not provide explicitly that a fiduciary can sue a participant or beneficiary to recover damages, such a right of action may not be judicially incorporated, and a claim for reimbursement and subrogation is not a traditional claim for "other appropriate equitable relief to redress [a] violation [of ERISA]").

The actuary in the case before me is not a fiduciary, and the action before me is for damages and not to enjoin a violative act or practice or obtain equitable relief.[4] The actuary is being sued, not for aiding and abetting a fiduciary as was the case in Mertens, but for the actuary's own wrong, for failing properly to perform the obligations directly and extensively imposed by ERISA on actuaries. Should Mertens be read as foreclosing such a suit under ERISA? Do the trustees have to bring their lawsuit in the New York Supreme Court, under New York law, notwithstanding that ERISA, not state law, provides the measure, scope and definition of actuarial duties for employee benefit plans? Do the broad preemption provisions of ERISA supersede state law and create a legislative/judicial vacuum that defines a duty but allows no right to recover damages caused by a breach of that duty? Before seeking to answer these intriguing and crucial questions, I turn to a discussion of ERISA's provisions with respect to preemption and exclusive federal jurisdiction.

B. Preemption

ERISA's preemption provision is broad, and has been interpreted broadly. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990). Ingersoll-Rand involved a case of wrongful termination of an employee whose pension rights had vested. The employee alleged that the company's reduction in force, as applied to him, was motivated to avoid further pension

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4 Although plaintiffs styled their claim as equitable, seeking restitution, their suit, as I ruled at argument, was at law, seeking compensatory damages caused by defendant's negligence. See n. 1, supra; Geller v. County Auto Line Sales, 86 F.3d 18, 22 (2d Cir. 1996) ("to receive restitution, a plaintiff must demonstrate that the defendant 'had wrongfully secured a benefit, or had passively received one which it would be unconscionable to retain'").

contributions and payments of pension benefits. He sued, however, to recover only lost wages and punitive damages, not lost pension benefits, and argued that his suit had no relation to ERISA and was properly before the Texas state courts. The Texas Supreme Court agreed, but the United States Supreme Court reversed. Justice O'Connor, writing for a unanimous court, held that the broad preemption provision of section 514(a), 29 U.S.C. §1144(a), applied, and that the employee's suit, even though not styled to invoke ERISA and even though not seeking an ERISA recovery, was nevertheless to be considered as "'relate[d] to'" an ERISA-covered plan." Id. at 140.

> The preemption clause is conspicuous for its breadth. Its deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern. The key to § 514(a) is found in the words "relate to." Congress used those words in their broad sense, rejecting more limited pre-emption language that would have made the clause applicable only to state laws relating to the specific subjects covered by ERISA. Moreover, to underscore its intent that § 514(a) be expansively applied, Congress used equally broad language in defining the "State law" that would be preempted. Such laws include "all laws, decisions, rules, regulations, or other State action having the effect of law."

Id. at 138-39 (citations omitted). "Even if a state law "is not specifically designed to affect such plans, or the effect is only indirect," the United States Supreme Court ruled, preemption applies. Id. at 139. The Court reasoned that since the existence of a pension plan was a "critical factor in establishing liability under the State's wrongful discharge law," the lawsuit "'relate[d]

to' an ERISA-covered plan" and was therefore preempted.[5]

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983), also illustrates the breadth of ERISA's preemption clause. The case involved New York's Human Rights law, a comprehensive anti-discrimination statute. The state law included a feature that provided that pregnancy had to be treated equivalent to other disabilities, and made it a violation of state law to discriminate against pregnant employees. The airlines sued to invalidate the provision as it affected employee benefits, arguing that it "related to" their employment benefit plans, and was therefore preempted. The Supreme

Court agreed, holding that section 514(a) required preemption, not only where there was conflict between the state law and a provision of ERISA, but also, even in the absence of such a conflict, if there was a relationship between the state law and an employee benefit plan.[6] The Supreme Court came to its holding by both a literal reading of the breadth of

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[5] Plaintiff argued that he should be allowed to maintain his state court lawsuit because ERISA did not apply to his precise fact situation. However, the United States Supreme Court noted, section 510 of ERISA, 29 U.S.C. §1140, made it unlawful to interfere with an employee's attainment of pension rights, thus suggesting that the state court lawsuit either had to conform to section 510 and be cognizable in federal court, or be barred. In either event, preemption had to apply, for the civil enforcement mechanism of ERISA, section 502(a), 29 U.S.C. 1132(a), providing certain remedies and not providing others, would be "completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." Id. at 142-43.

[6] The provisions of New York's law forbidding discrimination against pregnant employees were inconsistent at the time with federal civil rights laws. Insofar as other provisions of New York law were consistent with federal civil rights laws, the Supreme Court held that those provisions were not preempted, since Congress intended

section 514(a), and through consideration of Congressional history.

> The bill that became ERISA originally contained a limited preemption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's preemptive scope was as broad as its language:

Id. at 98. And, further:

> The emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required — but for certain exceptions — the displacement of State action in the fields of private employee benefit programs.

Id. at 99, n.20 (quoting remarks of Sen. Javits).

The breadth of preemption, however, had limits. "Some state actions," the Supreme Court noted, "may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Id. at 100, n.21. Shaw and Ingersoll-Rand illustrated what might be considered "too tenuous, remote, or peripheral" to an employee benefit plan: suits to garnish benefits to participants

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Footnote 6 *continued*

that federal and state civil rights laws should work in complementary fashion. Furthermore, ERISA § 514(d), 29 U.S.C. §1144(d), provided that ERISA does not "alter, amend, modify, invalidate, impair, or supersede any law of the United States," and the anti-discrimination laws of the United States were intended to work in complementary fashion with similar state laws. Thus, even though such harmonious provisions of state law "related to" the airlines' employee-benefit plans within the meaning of section 514 (a), they were not preempted because of the provisions of section 514 (d).

as, for example in marital contests, Id.; suits for lump-sum severance upon plant closures — in general, "state laws that [do not] relate to benefit plans," Ingersoll-Rand, 498 U.S. at 139. As the Second Circuit put it, in a case involving whether Connecticut's escheat laws could cover unclaimed employee-benefits, if a state statute of general application "does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated." Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 145-46 (2d Cir. 1989) (rule of preemption "does not require the creation of a fully insulated legal world that excludes . . . from regulation . . . any purely local transaction").

The services of professionals, it would seem, significantly affect "the structure, the administration, [and] the type of benefits provided by an ERISA plan," to quote the rule of Aetna Life. The fiduciaries of an ERISA plan must necessarily rely on the opinions of actuaries to determine what levels of benefits can be provided to participants and beneficiaries. The fiduciaries must necessarily rely on auditors and accountants to assure the financial integrity of the assets and earnings of the ERISA plan over which they have stewardship. And the fiduciaries must necessarily rely on lawyers to assure that the ERISA plan is properly organized and operates in conformity to the complex statutory, regulatory and caselaw framework. Not surprisingly, ERISA requires that actuaries and auditors be engaged to analyze, audit and report on the employee benefit plans, and provides the detailed framework within which they are required to operate and deliver their professional opinions. ERISA § 103, 29 U.S.C. § 1023 (quoted in substantial part earlier in this opinion).

One would therefore think that the negligence or misfeasance of an actuary, auditor, or attorney would

"relate to" an employee benefit plan in a significant way, that state law would be preempted, that the provisions referred to above would "supersede" state law, and that the district courts would be the exclusive forum to hear such suits. ERISA, §§ 502 (e), (f), 514(a), 29 U.S.C. §§ 1132 (e), (f), 1144(a). Surprisingly, however, many cases draw the opposite conclusion, presumably in response to the rulings of the Supreme Court in Russell and Mertens. See, e.g., Airparts Co., Inc. v. Custom Benefit Servs. of Austin, Inc., 28 F.3d 1062, 1065 (10th Cir. 1994) (state law negligence and fraud claims against plan actuary, held, not preempted); Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146, 1153 (3d Cir. 1989) (state law malpractice claim against plan accountants, held, not preempted); Board of Trustees, Teamsters Local 918 Pension Fund v. Freeburg & Freeburg, 98 Civ. 4895(SJ), 1999 WL 803895, at *4 (E.D.N.Y. Sep. 28, 1999) (state law malpractice claims against nonfiduciary plan accountants, held, not preempted); Liss v. Smith, 991 F. Supp. 278, 308 (S.D.N.Y. 1998) (state law legal malpractice claim, held, not preempted); Carpenters Union Local Union No. 964 Pension Fund v. Silverman, No. 93 Civ. 8787 (RPP), 1995 WL 378539, at *5 (S.D.N.Y. June 26, 1995) (state law malpractice and breach of contract claims against plan lawyers, held, not preempted); Issacs v. Group Health, Inc., 668 F. Supp. 306, 313 (S.D.N.Y. 1997) (breach of contract and negligence claim against plan actuary, held, not preempted); Pedre Co., Inc. v. Robins, 901 F. Supp. 660, 666 (S.D.N.Y. 1995) (state law claims for malpractice, fraud, breach of contract and conspiracy against plan accountants, held, not preempted).

The rationale of the Third Circuit, expressed in Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse, supra, is instructive. Relying on Russell, and anticipating the holding of the United

Supreme Court in Mertens, the Court of Appeals held that Congress intended not to give fiduciaries a right of action against non-fiduciaries for damages, for otherwise such a right would have been part of the "six carefully integrated civil enforcement provisions found in § 502(a)." Painters, 879 F.2d at 1152 (quoting Russell, 473 U.S. at 147). Were there not such a strong indication of Congressional intent, the Court of Appeals observed, the implication of a cause of action into the statute, in favor of fiduciaries and against non-fiduciary professionals for damages caused by their professional malpractice, would have been favored as "consistent with the statutory purpose of requiring an audit in accordance with specified standards" "for the benefit of the beneficiaries of employee benefit plans as represented by their trustees." Id. at 1152. The absence of recourse in the federal courts led the Court of Appeals to find recourse in the state courts, under state law.

> Moreover, state law has traditionally prescribed the standards of professional liability and, in the absence of clear indicia in the act or legislative history, we are reluctant to ascribe to Congress an intention to intrude in this area. Far from there being clear indicia of an intent to create an implied professional malpractice cause of action under ERISA, there is not a scintilla of evidence that Congress had this in its mind.

Id. at 1152-53. The Court of Appeals likened suits against professionals to "run-of-the-mill state law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan . . . not preempted by ERISA § 514(a). Id. at 1153, n.7.

Thus, the reasoning of the Second Circuit in Diduck has been forgotten — that a federal action against a non-fiduciary for money damages was

necessary to further the Congressional purposes of ensuring that plan beneficiaries were protected from nonfiduciaries' breaches of ERISA's mandates by uniform federal standards and exclusive federal jurisdiction. Diduck, 974 F.2d, at 280-81. Mertens and, more recently, Great-West Life, and their five-to-four majorities have displaced the sounder analysis of Diduck.

C. Evaluation

The case before me presents a fact pattern different from both Mertens and Diduck. The trustees, not the participants and beneficiaries, brought this suit against the actuary, seeking to recover damages caused to the employee benefit plan, not because the actuary aided wrongdoing fiduciaries, but because of the actuary's own negligent malpractice with respect to key ERISA activities required of actuaries: analyzing the actual experience of an employee benefit plan – the status of employer and employee contributions, costs, liabilities, number of participants and covered beneficiaries, current and present values of plan assets, present values of accrued and nonforfeitable benefits, the actuarial assumptions used to calculate all these variables and, upon all of this, the actuary's statement "that to the best of his knowledge the report is complete and accurate," that, "in combination, [it] offer[s] the actuary's best estimate of anticipated experience under the plan," that it discloses "any event which the actuary has not taken into account, and any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future," and that it contains "such other information regarding the plan as the Secretary [of Labor] may by regulation require," and "as may be necessary to fully and fairly disclose the actuarial position of the plan." ERISA §§103(d), 302(c), 29 U.S.C. §§1023(d), 1082(c).

Mertens was focused on a particular category of defendant when it ruled that the right-to-sue provisions of ERISA should be read narrowly and according to its explicit terms: "third persons who knowingly participated in the trustee's breach." Mertens, 508 U.S. at 256. Fiduciaries who had the power "to control and prevent the misdeeds" were exposed by ERISA to suits for damages, the Supreme Court held, not those who knowingly participated with them. Id. at 262. As the Supreme Court stated:

> All that ERISA has eliminated . . . is the common law's joint and several liability, for all direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did.

Id. The Supreme Court expressed its concern that an exposure of non-fiduciaries to joint and several liability as accessories "would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." Id.

In the case before me, the trustees are not guilty of wrongdoing and are not defendants. The trustees properly relied on the actuary whom they had engaged to provide the extensive and fundamental analyses and opinions required by ERISA, under standards provided by ERISA, and conforming to regulations promulgated by the Secretary of Labor under ERISA. Only the trustees have a potential claim against the actuary whom they engaged; it is a claim defined and bound up with standards created by federal law, and it is this type of claim that I am asked to adjudicate.

ERISA spells out the responsibilities of actuaries. ERISA §103, 29 U.S.C. § 1023. The level of detail reflects the fundamental importance of their roles to the efficient and effective administration of a pension

plan, for it is their analyses of levels of contributions, investment returns, administrative costs, and anticipated obligations to beneficiaries that enable the trustees to operate and administer an employee benefit plan according to expectations set out in a collective bargaining agreement, and to pay the level of defined benefits expected by, and promised to, retiring employees. ERISA's central purpose was to protect the interests of participants and their beneficiaries, by establishing uniform and national standards of responsibility and obligation, and providing ready access to the federal courts to resolve conflicts and disputes in the interpretation and application of ERISA's terms. See id. § 2(b), 29 U.S.C. § 1001(b). If 50 different states could define the standards to govern actuaries, a shambles would result. How would negligence be defined? Would punitive damages, or excessive awards for emotional damages, be assessable? Would standards differ from state to state, and affect multi-employer, multi-state employee benefit plans by multiple, confusing standards? If fiduciaries are sued by participants and beneficiaries under federal law (for federal standards would clearly govern), and defend on their allegedly reasonable reliance on an actuary's statement, would their defense be governed by federal law, or by state laws, and would the standards governing the fiduciary's defense differ from the standards governing the fiduciary's liability? Merely to state these questions makes it clear that a fiduciary's lawsuit against a negligent actuary must be governed by federal law. The same federal law that defines what an actuary must do must also define the standards that distinguish between reasonable and negligent conduct.

Responsible actuaries, like other professionals, traditionally carry insurance protection against their errors and omissions, and against potential claims of negligence. It is not likely that insurance rates would

vary materially, between actuaries carrying on a general insurance, underwriting and advisory practice, and those engaged by trustees of ERISA employee benefit plans. The Supreme Court's concern, expressed in Mertens, about the undue burden of insurance costs, might possibly apply to exposures for aiding and abetting liability;[7] the concern does not appear to be realistic in relation to a theoretical differential between general rates of actuaries' insurance premiums, and any speculative additional charge they supposedly might incur for their ERISA engagements. Nothing in Mertens, and nothing in the record before me, suggests that there might be such an additional charge.

The Supreme Court characterizes ERISA as a "comprehensive and reticulated" statute. See Great-West Life, 122 S.Ct. at 712 (quoting Mertens and Russell). But it cannot be a disembodied statute. The Congressional framers recognized that their bill was "not perfect," and that "on a bill so vastly complicated some consequences are almost certainly unforeseen." 120 Cong. Rec. 29192, 29193 (1974), reprinted in 3 Leg. Hist. at 4658 (H.R. floor debate on conference report, H.R. Rep. No. 93-1280, Aug. 20, 1974). Congress' intent to preempt the field and to provide uniform "substantive and enforcement provisions" that would "eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans" was clearly stated. 120 Cong. Rec. 29928, 29933 (1974), reprinted in 3 Leg. Hist. at 4658 (Senate floor debate on conference report, Aug. 20, 1974). The Congressional framers intended "that a body of Federal substantive law will be developed by the courts" to deal with the gaps, interstices and

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[7] See Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) (citing high defense costs, uncertainty of standards of behavior, and vexatiousness of litigation as reasons why aiding and abetting liability should be eliminated in securities "10b" litigation).

inevitable imperfections that a bill so comprehensive and detailed must surely develop. Id. at 29942, reprinted in 3 Leg. Hist. at 4771.

The preemption and exclusive federal jurisdiction provisions of ERISA were modeled on section 301 of the Labor Management Relations Act, 29 U.S.C. § 185; see Textile Workers v. Lincoln Mills, 353 U.S. 448, 451, 457 (1957). That section, and the Supreme Court's willingness to develop a federal common law thereunder, has created a fair, efficient and comprehensive statutory regime. See, e.g., Russell, 473 U.S. at 156 (Brennan, J., concurring in the judgment). The Second Circuit in Diduck recognized the fitness of that model, and applied it to ERISA. Diduck, supra, at 280.

Congress passed ERISA to remedy decades of abuse of employee benefit plans. The provisions for full and fair disclosure, to be implemented by annual reports of actuaries and accountants conforming to detailed statutory standards set out in section 103 of ERISA, 29 U.S.C. § 1023, reflect a fundamental Congressional concern. See ERISA § 2, 29 U.S.C. § 1001; H.R. Conf. Rep. No. 93-1280, at 284, reprinted in 1974 U.S.C.C.A.N. 5038, 5065 (1974), reprinted in 3 Leg. Hist. at 4551. These provisions, no different than others, were to be part of the "comprehensive and pervasive" federal scheme that Congress intended should "displace[] . . . State action in the field of private employee benefit programs," and be governed by a uniform, federal law. 120 Cong. Rec. 29928, 29942 (1974), reprinted in 3 Leg. Hist. at 4771. The exclusive federal forum that Congress provided for ERISA litigation is the natural and exclusive forum that should hear and determine the lawsuits of trustees against the actuaries they engaged, for damages caused by those actuaries when they have failed to conform their conduct to the standards provided by ERISA.

V. Conclusion

For the reasons stated in this Opinion, defendant's motion is denied as to plaintiff's first claim for relief, alleging a claim under ERISA, and plaintiffs are given leave to amend their claim in the respects noted earlier in this Opinion. Since I have sustained the legal sufficiency of plaintiffs' claim for relief under ERISA, I hold that plaintiffs' second and third claims for relief, stating claims under New York State law, are preempted by federal law and are therefore dismissed.

I find that the circumstances for an interlocutory appeal are satisfied. Pursuant to 28 U.S.C. §1292(b), I find that the issues of federal jurisdiction under ERISA, and the interplay between the federal claim and the state claims, present controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation. Because this litigation will inevitably proceed, either in this court as I have ordered or in the New York Supreme Court if my rulings are reversed, there will be no stay. The parties, by their respective counsel, will appear for their Initial Case Management Conference on April 12, 2002, at 10:30 a.m.

SO ORDERED.

Dated: New York, New York
March 13, 2002

ALVIN K. HELLERSTEIN
United States District Judge